82-1193

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. _____

MOHAMMAD H. MARASHI, Petitioner

v.

FORBES FURNITURE COMPANY, Respondent, and
PEERLESS INSURANCE COMPANY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEALS, FIFTH DISTRICT

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January 3, 1983

QUESTIONS PRESENTED

Whether Petitioner, MOHAMMAD H. MARASHI, has been denied due process of law within the meaning of the Fifth and Fourteenth Amendment to the United States Constitution when

a) the trial judge refused to continue the trial though Petitioner, an Iranian and outside the United States, could not be present for the proceedings of the case due to the restrictive immigration policies of the Federal Government. (b) Petitioner was denied his right to due process of law by the trial court's denial of Petitioner's motion for relief from the judgment when such decision was against all the evidence presented at the hearing. (c) when the trial judge's award of attorney's fees for Respondent, Forbes Furniture Company, was based upon the Petitioner's failure to

present a meritorious defense even though the Petitioner could not re-enter the United States to present his defense.

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FIFTH DISTRICT

THE PETITIONER, MOHAMMAD H. MARASHI, respectfully prays that a writ of certiorari issue to review the judgments of the Florida District Court of Appeals, Fifth District, entered in this proceeding on April 7, 1982 and on August 26, 1982.

OPINION BELOW

The orders of the Florida District Court of Appeals, Fifth District, dated April 7, 1982 and August 26, 1982, appear in the appendix hereto. No opinion was rendered by the court.

JURISDICTION

The trial court entered its judgment on January 26, 1981. On April 7, 1982, Florida District Court of Appeals, Fifth District, affirmed the judgment without opinion. The trial court denied a timely motion for relief from the judgment on June 17, 1982. A timely appeal of the denial of the motion for relief to the Florida District Court of Appeal, Fifth District was dismissed on August 26, 1982. The Florida Supreme Court dismissed Petitioner's timely appeal on October 5, 1982 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC

§1257(3) and is based upon a deprivation of the Petitioner's rights afforded by Fifth and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ... ..."

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> "... ... nor shall any state deprive any person of life, liberty or property, without due process of law; ..."

SECTION 57.105 FLORIDA STATUTES

> "The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party."

STATEMENT OF THE CASE

This case arose between Petitioner (hereinafter referred to as Marashi) and Forbes Furniture Company (hereinafter referred to as Forbes). The Complaint, filed by Forbes on June 27, 1980, sought damages for goods sold by Forbes to Marashi while Marashi was residing in the United States. Marashi maintained that the amount of money sought by Forbes did not accurately reflect the contract price, that the invoices contained several charges for items that were properly rejected by Marashi, and that the amount owed had been satisfied. Subsequent to service, Mr. Marashi left the United States on business and was denied re-entry by the State Department in light of his Iranian citizenship and the hostage crisis. In July, counsel for Marashi filed an answer containing several affirmative defenses in which Marashi

alleged his position. On August 21, 1980, Forbes filed a motion for summary judgment. Counsel for Marashi attempted to counter the motion with affidavits. However, because Marashi, was not able to re-enter due to the restrictive immigration policy established by the Federal Government, counsel for Marashi was unable to obtain the required affidavit from the Petitioner. Only Marashi, himself, could provide the evidence required to defend the claim. Counsel for Marashi, therefore, requested a continuance on the motion for summary judgment. The motion was based on Marashi's inability to return to the United States and on Marashi's desire to defend the law suit.

On October 3, 1980, the trial court continued the summary judgment hearing for 17 days. Counsel for Marashi again filed a motion for continuance and an affidavit

of one of the sons of Marashi in opposition to the summary judgment. The affidavit again recited that Marashi was outside of the United States and was unable to return (A/7). On October 20, 1980, the trial court granted Forbes a summary judgment on all issues but the affirmative defenses as to rejection of only a few items. A trial date of January 13, 1981 was set. At the trial, Marashi's counsel, again, moved for a continuance due to Marashi's inability to re-enter the United States, (A/5). No witnesses appeared at the trial for Marashi because Marashi was the only party who had knowledge of the transactions. On January 26, 1981, the trial court entered a final judgment against Marashi for damages. The final judgment also was for attorney's fees based on Marashi's failure to present a defense, (A/8). On February 25, 1981, a Notice of Appeal was served and filed. In

Petitioner's appellate brief, it was argued that Marashi was denied his right of due process guaranteed by the Fifth and Fourteenth Amendments because the trial court proceeded without Marashi being able to be present and that such denial of the continuance and the award of attorneys fees constituted a gross abuse of discretion, (A/23). On April 7, 1982, the Florida District Court of Appeals, Fifth District, entered a per curiam affirmance of the trial court's judgment, (A/11).

After the judgment was rendered on January 26, 1981, the ban precluding Marashi's re-entry was lifted and Marashi returned to the United States to review the case and all the documents with his counsel. At that time, he presented several documents he had received from Forbes which indicated he was not liable for the damages. These documents also showed a justiciable issue.

Through counsel, Marashi filed a timely Motion for Relief from the Judgment based upon evidence not available at the time of trial, (A/25). In support of that Motion, Marashi filed his affidavit attaching the documents which showed that he was not liable to Forbes, (A/28). On June 17, 1982, a hearing was held at which the only evidence that was introduced was the affidavit of Marashi. Forbes did not respond to the motion and did not introduce any evidence. The documents introduced at the hearing were never before the court at the January 13, 1981 trial. On June 17, 1982, the trial court entered an order denying Marashi's motion for relief. Such order was appealed on July 16, 1982. Forbes filed a motion to dismiss the appeal of Marashi. In that motion, Forbes stated that the second appeal was the same as the first.

On August 26, 1982, the District Court of Appeals dismissed the appeal, (A/40).

On September 25, 1982, Marashi requested the Supreme Court of Florida to review the District Court's order under the Court's all writs power and the Court's responsibility to review the action of the lower Florida Courts. Marashi also filed an appeal. On September 30, 1982 the Florida Supreme Court denied to review the Petitioner's petition for review, (A/41). On October 5, 1982 the Florida Supreme Court dismissed Marashi's appeal. Marashi has brought this petition for certiorari in the Supreme Court of the United States.

HOW THE FEDERAL QUESTION WAS PRESENTED

As has previously been recited, Marashi has properly preserved his claim of a deprivation of a Federal Constitutional right, pursuant to state practice and has exhausted his ability to obtain

relief within the Florida judicial system, 28 USC § 1257(3), Central Union Co. v. Edwardsville, 269 U.S. 190, 70 L. Ed. 229, 46 S.Ct. 90 (1925). The first question of which Petitioner seeks review in this Court is the denial of Petitioner's right to due process of the law when the trial was conducted despite the fact the Petitioner, being outside the United States, was denied re-entry by the State Department and was the only witness. The denial of due process issue was inherently raised continuously throughout the proceedings in the trial court through counsel's repeated requests for a continuance and was specifically raised on appeal in Florida's appellate courts.

A constitutional issue, in Florida, may be properly raised if it is inherent in the issue before the Court, Buchman v. State Board of Accountancy, 262 So.2d 198 (Fla. 1962). In addition, this Court does

not require that particular words and phrases be used to raise a constitutional issue. It is only essential that the Petitioner bring the claim and the grounds therefor to the state court's attention with fair precision, New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61 (1928). In this case, the heart of Marashi's claim is that Marashi's presence was necessary to properly prepare and try the case. Such an issue was squarely before all the state courts.

In addition, the District Court of Appeal had to consider the federal constitutional issues presented. When the state court assumes that the federal question is properly before it and disposes of the issue, then the concern over the proper raising of the federal question has historically disappeared Whitney v. California, 274 U.S. 357, 71 L.Ed 1095, 47 S.Ct. 641 (1926)

Marashi obviated the due process claim in the motion for relief. Marashi argued that since he was in the United States, evidence which was previously unavailable and which was necessary to his defense became available and that he should be allowed to set aside the judgment and re-open the case. This motion was denied. The appeal of that denial was dismissed on the motion of Forbes that the second Appeal reiterated the first. Therefore, the federal claim of due process guaranteed to Marashi was raised in both appeals.

Lastly, the federal claim on Marashi's inability to be present was raised in the petition to the Supreme Court of Florida.

The second and third federal claim of Marashi was also properly raised. The second and third claim could only be raised at the appellate leve. This was done.

Even if the due process claims were not properly raised, this court has the power to review the state court proceedings. As will be seen in the next section, the denial of due process by the state trial court was an error that seriously affected the fairness, integrity and public reputation of the court proceedings. This court has the power to notice substantial denials of due process where the errors constitute a denial of fundamental fairness in the proceedings, Silber v. United States, 370 U.S. 717, 8 L.Ed.2d 798, 82 S.Ct. 1287 (1962). This court has recently recognized the fundamental unfairness in the justice afforded the Petitioner in its decisions in United States v. Valenzuela-Bernal, ___ U.S. ____, 73 L.Ed.2d 1193, 102 S.Ct. 3440 (1982) and Lassiter v. Department of Social Services, ____ U.S. ____, 101 S.Ct. 2153, ____ L.Ed.2d ____ (1981).

Therefore, this Court has jurisdiction to review the federal questions presented in this petition in light of the federal constitutional deprivations properly preserved and brought to this court for review.

REASONS FOR GRANTING THE WRIT

1. The decision in the state court proceedings conflict in general principle with decisions of this Court on the interpretation of the due process clause of the 5th and 14th Amendments to the United States Constitution.

The basic notion of the due process clause of the 5th and 14th Amendments that no person shall be deprived of property without due process of law is applicable to aliens. Kwang Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953).

Due process in a civil case is a flexible concept. The requirements needed for the state to meet the due process requirements vary as the circumstances change. However, the basic right to due process entails fundamental fairness Adamson v. California, 332 US 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1948);

The basic requirements of procedural due process is that a person must be granted an opportunity to have a hearing at a meaningful time and in a meaningful manner. Armstrong v. Mango, 380 US 545, 85 S.Ct. 1187, 14 L.Ed. 2d 62 (1965).

Generally, this court has held that due process requires the consideration of three factors: First, the nature and extent of the private interest that will be effected; second, the risk of an erroneous decision; and third, the governments' interest, Mathews v. Eldridge, 424 US 319 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).

In a civil trial, this Court has held that a person has the right to be present at every stage of the trial, Fillippon v. Alion Vein State Co., 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed 853 (1919). In essence a party has the fundamental right to confront and cross-examine witnesses and to present evidence on his behalf. These rights do not rest solely with a criminal defendant, Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843,____ L.Ed. 2d _____, (1969).

From the above cases, there is no question that the trial judge cannot prevent a party from being present, from presenting evidence and crossexamining witnesses. In the case of Marashi, the trial judge did not expressly rule that Maraghi cannot exercise his rights. However, he did rule that the trial must proceed and denied the request of counsel for Marashi for a continuance.

The effect of such a ruling is the same as if the trial judge ruled that Marashi could not be present, present evidence and cross examine. Marashi was outside the United States during the state court trial proceedings. At the time of the state court proceedings, the United States was involved in an international crisis where Americans were imprisoned by Iran. In retaliation, the United States restricted the immigration of Iranian citizens into the United States. Marashi, an Iranian, could not re-enter the United States. This was placed before the trial judge several times by counsel for Marashi. The trial judge knew that Marashi was unable to attend though no fault of his own. It is true that the rights enumerated above can be waived; however, such a waiver cannot be imposed on Marashi when he is unable to exercise his right due to a situation beyond his control. An act

which has the effect of depriving a person of due process is just as unconstitutional as an act that directly deprives the person of due process.

The trial court recognized the problem associated with Marashi's absence. However, the trial court felt that Marashi could effectively be present through counsel and present his evidence by deposition. To meet the requirements of due process, the opportunity for a hearing must be granted in a meaningful manner, Armstrong v. Manzo, supra. Marashi could not present his case through counsel. He was the only one who had knowledge of the transaction. He was outside the United States and his papers were inside. He could not adequately prepare for trial until he had reviewed all the documents. In addition, no one knew what documents were important and which documents were not, or even where these documents were.

Only Marashi could piece together the transaction after he had an opportunity to review all the documents. Once Marashi returned, he was able to prepare for trial.

Marashi was denied the right to confront the witness and cross-examine the witnesses at trial. Since he was the only one who knew the facts, subtle meanings of testimony could be missed by counsel. Marashi in his defense could not counter the statement of the witness at trial and present a complete and accurate picture of what occurred. Marashi under the trial court's view could be stuck only with the deposition to prove his case. Meanwhile, Forbes would have time to review any testimony of Marashi and counter Marashi's statements without fear of contradiction. In effect, the trial court was forcing Marashi to present his case first and at a significant time prior to the presentation

of Forbes case, and without the right to rebut any testimony of Forbes. Such an effect does not meet with the fundamental fairness expected of traditional American justice.

This court has been sensitive in the recent past to these problems in providing a person the opportunity to a meaningful hearing. The trend has been to review carefully the effect of the procedure used for a hearing, see for example, Landon v. Plasencia, 51 L.W. 4001 (Nov. 15, 1482) and United States v. Valenzuela - Bernal, ___ U.S. _____, 73 L.Ed.2d 1193, 102 S.Ct. 3440 (1982).

The denial of due process of Marashi was heightened by the lack of prejudice on the part of Forbes. The case was only 6 months old at the time of trial, the hostage situation was only a few days from resolution, Marashi would return soon and was willing to go to trial, and Forbes

could collect if he won the case from the bond that Marashi had posted. Prompt efficient procedures is a proper state interest. However, this Court has stated that the Constitution recognizes higher values than speed and efficiency. The due process clause was designed to protect the fragile values of a vulnerable citizen from an overbearing concern for efficiency that may result from state official, Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972). This is particularly true in Marashi's case where Marashi presented a meritorious defense in the motion for relief that was not countered by Forbes. The due process clause was to prevent a result where the speed of the trial prevented Marashi from presenting his defense. The speed of the trial led the judge to decide to award attorneys fees based on the fact that Marashi did not have any meritorious

defense, that Marashi's defense was frivolious and a sham.

Therefore, the Florida District Court of Appeal and the decisions affirming the trial court's ruling deprives Marashi of his guaranteed right to due process and conflicts in principle with the decision of this Court. Such a conflict is reviewable, Ivan Allen Co. v. United States, 422 U.S. 617.

2. The decisions below raise significant and important problems concerning the fairness, intergrity and public reputation of public proceedings.

The right to due process is a fundamental right guaranteed to all persons of the United States. As such a deprivation of the right is an important consideration. The importance of this case is heightened because of the number of aliens who are residents of the United States and the present turmoil in many

countries. Public opinion, emotion and tremendous pressures from a shift in political situations in foreign countries makes it likely that situations similar to Marashi's will occur again. Aliens in these situations must be afforded a fair trial. Marashi recognizes the principle that this court is not constituted only to correct the errors of a lower court. However, this court has stated that it has a constitutional mission to correct gross miscarriages of justice, especially when fundamental constitutional questions are presented, Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed2d 654, 80 S.Ct. 624 (1960), Montana v. Kennedy, 366 U.S. 308, 6 L.Ed2d 313, 81 S.Ct. 1336 (1961).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments of the Florida District Court of Appeals, Fifth District.

Respectfully submitted,

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